Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

L.E.S. PROPERTIES, HOTEL VENTURE, L.P.,
A California limited partnership,

Petitioner,

v.

WESTIN HOTEL COMPANY,
a Delaware corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Does the Seventh Amendment require a district court to enter a judgment based on the true intent of a jury in rendering its verdict as clarified by written interrogatory?

   A. Did the District Court/Court of Appeals violate the Seventh Amendment in this case by entering/upholding a judgment which is inconsistent with the jury's verdict as clarified by subsequent interrogatory?

2. Does the Ninth Circuit's decision affirming a judgment which is inconsistent with the jury's true intent conflict with previous decisions of this Court?

3. Does the Ninth Circuit's decision disapproving of the District Court's submission of an additional interrogatory to a still-impanelled jury upon learning of an error in the recordation of the jury's verdict and resulting affirmance of a judgment which is inconsistent with the jury's true intent conflict with the decisions of other Circuit Courts of Appeal?

4. Did the District Court violate the Seventh Amendment by striking down a jury's punitive damage award which was supported by substantial evidence?

5. Should the United States Supreme Court exercise its "power of supervision" over all inferior federal courts to compel the District Court to give effect to the jury's true intent as stated in its answer to a clarifying interrogatory and/or to direct the Circuit Court of Appeals to afford a judgment which ignores the jury's true intent something more than cursory review?

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner L.E.S. PROPERTIES HOTEL VENTURE, L.P. ("L.E.S." or "Petitioner") respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered in the above entitled matter on May 31, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reprinted in the Appendix at pages

App. 1-5. The United States Court of Appeals for the Ninth Circuit's order denying Petitioner's Petition for Rehearing and Suggestion of Rehearing En Banc (filed August 16, 1994) is reprinted in the Appendix at pages App. 6-7.

JURISDICTION

The jurisdiction of the District Court to decide this controversy was invoked under 28 U.S.C. § 1332(a)(1).

The Court of Appeals exercised jurisdiction over this case based on the timely filing of an appeal from a final judgment under 28 U.S.C. § 1291.

Petitioner seeks the exercise of jurisdiction by this Court under 28 U.S.C. § 1254. The petition has been filed within the time prescribed by 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

INTRODUCTION

It is undisputed that the judgment entered by the District Court in this case does not accurately reflect the

intent of the jury as clarified by the record of events subsequent to the verdict but before the jury was discharged. Based on substantial evidence presented at trial, the jury intended to award compensatory damages to Petitioner in the amount of approximately $5.57 million. Before the jury was discharged, the District Court and the parties learned that the jury had erred in recording its verdict on the form provided by the District Court. The jury's true intent was revealed in a subsequent interrogatory submitted by the District Court to the jury for the purpose of clarifying the verdict.

During post-trial proceedings, the District Court (Marquez, D.J.) determined that the jury's answer to the subsequent interrogatory should not be considered in construing the verdict and, as the result of the application of purely legal concepts concerning overlapping theories of recovery, entered a judgment awarding Petitioner only $1.4 million in compensatory damages. The District Court also granted Respondent's motion for judgment as a matter of law (FRCP 50), eliminating a $2 million punitive damage award rendered in favor of Petitioner by the jury.

Petitioner's appeal from the judgment raised substantial issues of law upon which rested over $6 million dollars in additional damages. Nevertheless, the matter received only the most perfunctory consideration by the United States Court of Appeals for the Ninth Circuit (Kozinski and Trott, Circuit Judges; Williams, District Judge, sitting by designation), underscored by oral argument designed to curtail, rather than foster, any meaningful discussion of the issues and a 3½ page cursory decision signalling the intermediate appellate court's contempt for the jury's deliberative process.

Petitioner's subsequent petition for rehearing and suggestion of rehearing en banc was denied.

STATEMENT OF FACTS

Petitioner L.E.S. Properties Hotel Venture ("L.E.S.") is a California limited partnership. Respondent Westin Hotel Company ("Westin") is in the business of designing, developing, marketing and managing first-class hotel facilities and is the oldest hotel management company in the United States.

In the late summer/early fall of 1988, high-level Westin executives met with representatives of L.E.S. to discuss development of a Westin-managed hotel on undeveloped property (near downtown San Diego) on which L.E.S. held an option. Westin's representatives encouraged L.E.S. to purchase and develop the property as a Westin facility. Of course, to develop the property as a Westin facility, L.E.S. would have to meet Westin's specifications and was encouraged by Westin representatives to hire Westin to prepare an initial written projection of the estimated results of hotel operations for the first five years (a "proforma") in order to secure construction financing. In making its pitch, Westin touted its superior skill, knowledge and expertise in the hotel industry.

In reliance on these representations and Westin's professed continuing interest in the development of the project, L.E.S. exercised its option to purchase the property and expended a sizable sum of money to obtain expanded conditional use permits for the project.

Westin and L.E.S. also entered into a written letter agreement (the "Letter Agreement") drafted by Westin, in which Westin promised to promptly deliver the required proforma.[1] The Letter Agreement stated that upon the completion of the proforma, the parties would execute a Pre-Opening Services Agreement and Management Agreement, by which Westin would gain the exclusive right to operate L.E.S.'s hotel for a considerable fee over the next 20 years.

Although L.E.S. paid Westin over $100,000 in fees and expenses on the Letter Agreement, Westin failed to deliver the initial proforma within the time promised. Westin offered L.E.S. several excuses for its failure to provide the necessary proforma and urged L.E.S. to sign the Pre-Opening Services Agreement and Management Agreement without seeing the financial data. Unbeknownst to L.E.S., by this time, Westin had actually generated two proformas. However, both of these proformas indicated that the development of a Westin Hotel on the property was **not** economically feasible. These proformas were not disclosed to L.E.S.[2]

In fact, Westin did not produce a proforma for the project until L.E.S. refused to execute the Pre-Opening and Management Services Agreements. Not surprisingly,

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[1] The evidence indicated that the parties expected that a proforma would be generated within 60 to 90 days. This time frame was consistent not only with Westin's own custom and practice, but also the custom and practice of the hospitality industry.

[2] L.E.S. learned of the existence of these proformas only through discovery in the instant litigation.

the third proforma generated by Westin was highly favorable – projecting a high cash flow for debt service for the first five years of operation. Unfortunately, as Westin admitted at trial, the third proforma was false and inaccurate. It was purposely prepared to make the economic projections on the proposed hotel look as attractive as possible and deter L.E.S. from seeking another operator.

Westin's plan was successful. In reliance on Westin's admittedly false and inaccurate projections, L.E.S. executed the Pre-Opening Services and Management Agreements.

However, the deception did not stop with the execution of these agreements. Despite its analysis indicating that the project was economically unfeasible, Westin representatives continued to assure L.E.S. of the viability of the project and of Westin's commitment to its success. Westin was, after all, in a "no-risk" position. Westin encouraged L.E.S. to continue its efforts to obtain construction financing for the proposed hotel and even stood silent when L.E.S. retained a mortgage brokerage firm (at considerable expense) to find an equity partner or syndicate the proposed hotel.

In January 1988, Westin was taken over by Aoki Corporation, a large Japanese construction company whose primary objective was to significantly expand its management and development operations throughout the world. By 1989, all of the high-level executives at Westin who had been working on the L.E.S. project had been replaced by Aoki employees, who expressed concerns about the viability of the L.E.S. project. As a result of these changes, Westin re-evaluated its involvement in the

project and decided to pursue another location in San Diego closer to the water.

In July 1989, Westin generated yet another proforma which projected insufficient earnings to service the debt on the property and stood in stark contrast to the admittedly false figures concocted by Westin in the third proforma. Signalling that it knew the fourth proforma would be the death knell of the project, Westin hand-delivered the fourth proforma to L.E.S. without explanation.

The effect on the project was as predicted. L.E.S. could not obtain financing for the project and the development of the property was halted. Due to a downturn in the economy, L.E.S. could not sell the property. The development permit for the property expired in 1992.

STATEMENT OF CASE

L.E.S. filed suit against Westin in the United States District Court for the Southern District of California. In its first amended complaint, L.E.S. advanced seven claims for relief, including claims for fraud, negligence, breach of contract, and breach of the implied covenant of good faith and fair dealing.

During the course of the seven-day trial, L.E.S. presented evidence that, after inducing L.E.S. to enter into the Letter Agreement based on Westin's alleged superior skill and knowledge of the hotel industry, Westin had intentionally misrepresented and/or concealed material facts from L.E.S. to persuade it to continue with the development of the property, thereby allowing Westin to

collect fees and other incentives with no risk to Westin. In its defense, Westin argued that its conduct with regard to the proformas was, at most, the result of "honest" differences of opinion in business judgment within Westin.

The evidence at trial demonstrated that as a result of Westin's conduct, L.E.S. had suffered actual out-of-pocket losses totalling more than $1 million dollars and a projected diminution in the value of the subject property of over $6 million.

After considering all the evidence, the jury rendered its verdict on the special verdict form prepared by the court. The verdict was against Westin in the aggregate sum of $5,570,250, divided among the various claims for relief as follows: $375,000 on the negligence claim (subject to 25% reduction for L.E.S.'s contributory negligence); $500,000 on the breach of covenant of good faith and fair dealing claim; $1,444,000 on the breach of contract claim; $1,457,000 on the negligent misrepresentation claim; $944,000 on the intentional misrepresentation claim; and, $944,000 on the intentional concealment claim.

During the punitive damages stage of the trial, the jury learned (in connection with its consideration of the ratio between punitive and compensatory damages) that L.E.S. would receive only the single largest award of the compensatory damages on the special verdict form (i.e., $1,457,000).[3] At the first opportunity during deliberations

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[3] Given the lack of any evidentiary basis for varying awards on its theories of recovery, L.E.S. suspected that the jury had erroneously apportioned its damages award among the various causes of action. Prior to the commencement of the

on punitive damages, the jury inquired by way of written question to the court: "Are the damages that were awarded accumulative [sic]?" The district judge called in counsel and the jury. In response to the judge's oral inquiry regarding the meaning of this question, the jury foreperson explained:

> **We just want to make sure the damages awarded in each one of those counts – are those, at the end, cumulative? All of the amounts that we added up – we had a certain figure that we were going to award. We wanted to make sure that we understand they were all cumulative damages.**

In short, the jury wanted to know (prior to deliberating on the punitive damages issue) whether its compensatory damage awards were going to be aggregated as intended. In response to the inquiry, the district court submitted a single additional written question to the jury: "On your verdict dated September 3, 1992, did you intend to award L.E.S. the total of all claims, which is $5,570,250?" The jury then retired to resume deliberations.

Within nine minutes, the jury returned with a verdict awarding punitive damages against Westin in the sum of $2 million, and an **affirmative answer** to the district court's question, indicating that the jury's intent was to

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punitive damages phase of the trial, L.E.S. requested on two separate occasions that the court inquire whether the jury intended to award the aggregate of the sums listed for each claim on the verdict form. The court denied L.E.S.'s requests.

award L.E.S. compensatory damages in the total sum of $5,570,250.

Following the verdict, L.E.S. requested entry of judgment in the amount of $7,570,250 (i.e., $5,570,250 in compensatory damages, plus $2,000,000 in punitive damages) based on the jury's verdicts. Westin objected to the proposed judgment, arguing that the compensatory damages on the verdict could not be aggregated, despite the jury's clear intent to award the entire sum. In its reply, L.E.S. noted that entry of a judgment in an amount less than intended by the jury would violate the Seventh Amendment.

During the post-trial proceedings, the District Court determined that the interrogatory submitted to the jury in response to the suggestion that the damages should be aggregated was "inappropriate." The District Court also struck the jury's punitive damage award pursuant to F.R.C.P. 50(a) finding L.E.S. had not proven the requisite fraud by clear and convincing evidence. Judgment was thereafter entered in favor of L.E.S. in the amount of $1,457,000.

L.E.S. appealed the judgment on the ground that it did not accurately reflect the jury's findings with regard to damages. In briefing the issue, L.E.S. presented case authority holding that a judgment which does not accurately reflect the jury's findings violates the Seventh Amendment of the U.S. Constitution.

Despite the significance of the issues involved and the substantial amount of money at stake, the Ninth Circuit panel expressed indifference to the Seventh

Amendment guaranty to jury trial.[4] On May 31, 1994, the Court issued a 3½ page memorandum opinion affirming the District Court's judgment as consistent with the jury's award of "various amounts on the various theories of recovery" on the special verdict form. The Court opined (without any discussion of the authorities from other circuit courts of appeals cited by L.E.S.) that the District Court had properly ignored the jury's subsequent indication of a different intent because the aggregation of the awards was a "question of law" outside the province of the jury.

The panel's treatment of L.E.S.'s challenge to the eradication of the jury's punitive damage award was equally perfunctory: "[T]he evidence L.E.S. presented did not sufficiently support an award of punitive damages."

L.E.S.'s Petition For Rehearing And Suggestion Of Rehearing On En Banc was denied on August 16, 1994. Appendix, App. 6-7.

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[4] The Court's position is typified by the following exchange early during oral argument:

Mr. Strauss: . . . [It is] not in dispute and not in issue in this case that this jury intended to award my clients $5.5 million in compensatory damages and $2.0 million in punitive damages. . . .

J. Kozinski: **So what if that is what they intended.** . . . What does the jury's hopeful wish in that regard have to do with anything?

REASONS FOR GRANTING WRIT

I.

THE DISTRICT COURT/COURT OF APPEALS VIOLATED THE SEVENTH AMENDMENT IN THIS CASE BY ENTERING/UPHOLDING A JUDGMENT WHICH IS INCONSISTENT WITH THE JURY'S VERDICT AS CLARIFIED BY SUBSEQUENT INTERROGATORY.

As noted above, the right to trial by jury on all issues of fact is guaranteed to Petitioner by the Seventh Amendment of the United States Constitution.

"The aim of the [Seventh] Amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, ... " *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1934). As such, the Amendment not only preserves the right to request a jury trial, its "studied purpose" is to prevent encroachment of the right by the court as the result of the imposition of procedural restrictions and/or an unauthorized re-examination of the facts. *Id.*; see also *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 377-379 (and cases cited therein) [any mode of trial which endangers the right of trial by jury is an "infraction of the Seventh Amendment"].

Obviously, the jury's role in our judicial system[5] is skewed if the judgment entered by the District Court

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[5] Several courts have opined that the purpose of the jury is to inject a certain amount of "flexibility" into the judicial process. *Guidry v. Kem Mfg. Co.*, 598 F. 2d 402, 405 (5th Cir. 1979) [the law "permits the jurors to import notions of lay justice, to temper legal rules and to render a verdict based on their consciences and ideas of how the case ought to be decided without strict compliance with the rules laid down by the court."].

does not "reflect the true intent of the jury." See *Attridge v. Cencorp Division of Dover Technologies International, Inc.*, 836 F.2d 113, 114 (2d Cir. 1987). For that reason, this Court has recognized that the Seventh Amendment mandates that a trial judge interpret the jury's verdict so as to accomplish the jury's true intent. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962).[6] Simply put, the Seventh Amendment "precludes entry of a judgment that disregards any material jury finding." See *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 890-891 (2d Cir. 1988) [and cases cited therein].

II.

THE NINTH CIRCUIT'S DECISION DISAPPROVING OF THE DISTRICT COURT'S CLARIFICATION OF A STILL-IMPANELLED JURY'S VERDICT CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL.

As noted above, the Ninth Circuit's decision in this case confirmed the district judge's suggestion that it was inappropriate to use a supplemental written interrogatory to clarify the verdict rendered by the still-impanelled jury. In so ruling, the Ninth Circuit has signalled its intent to follow a path which directly conflicts with decisions of other Circuit Courts of Appeal.[7]

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[6] Since the Ninth Circuit's decision affirms a judgment which is inconsistent with the jury's true intent, it also conflicts with previous decisions of this Court.

[7] The emergence of this conflict has been recognized in previous decisions. *McCullough v. Consolidated Rail Corp.*, 937 F. 2d 1167, 1172 (6th Cir. 1991); *Ferrante v. Metro-North Commuter R.R.*, 738 F.Supp. 106, 108-109 (S.D.N.Y. 1990) [recognizing a "difference of opinion" between the circuits].

The Eleventh Circuit, for example, has instructed the district courts within its jurisdiction that when examining the verdict for the jury's intent, the district court should consider not only the jury's "categorical answers" (i.e., the yes-or-no responses or the bottom-line dollar figures) to the questions submitted, but also any specific explanation the jury offers for its answers. *Royal Cup, Inc. v. Jenkins Coffee Service, Inc.*, 898 F.2d 1514, 1522-23 (11th Cir. 1990).

Likewise, the Third Circuit has recognized the wisdom of ensuring that the verdict reflects the jury's true intent:

> It would be anomalous to hold that, while a court . . . must search for a view of the case which will make the jury's answers consistent, it may not submit an additional interrogatory to the jury to clarify an ambiguity. (Citation omitted.) Moreover, in purely pragmatic terms, it seems terribly inefficient not to obtain clarification from a still-impanelled jury of the meaning of its answers and verdict, especially when we consider that unclarified inconsistent answers often necessitate a retrial of the entire case. *Stanton v. Astra Pharmaceutical Products, Inc.*, 718 F.2d 553, 575-576 (3rd Cir. 1983).

The Second Circuit has concluded that "[u]nyielding refusal to question jurors is without sound judgment where the court surmises that the verdict announced differs from the result intended." *Attridge v. Cencorp Division of Dover Technologies International, Inc., supra,* 836 F.2d at 114. Where (as here) the jury's statements and the trial court's question allow the court to "ascertain what the

jury decided and not why they did so," the information should properly be considered in framing the appropriate judgment. *Id.*, at 117.[8]

The Sixth Circuit has adopted the procedure recommended by the Eleventh Circuit in *Attridge* as the "better reasoned approach." *McCullough v. Consolidated Rail Corp.*, 937 F.2d 1167, 1172 (6th Cir. 1991). The court noted that the interests of justice are served by assuring that the plaintiff received the verdict intended by the jury. *Id.* Especially, where (as here) "the jurors themselves brought the mistake in the verdict to the court's attention." *Id.*[9]

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[8] In *Attridge*, the jury awarded the plaintiffs a "total verdict amount" of $150,000. After the jury was discharged, two of the jurors told the courtroom deputy (who subsequently informed the judge) that contrary to the court's instructions, the jury had reduced its award by plaintiffs' comparative negligence and that the $150,000 verdict represented the net recovery due after such a reduction.

The district judge recalled the jury and asked each juror the following question: "What was your understanding as to what the verdict was; what was the jury verdict?" Based on the juror's clarifying responses, the district court entered judgment in the full amount of $150,000. On appeal, the Second Circuit approved the procedure used by the district judge, finding "the interviews were intended to resolve doubts, resolving the accuracy of the verdict announced, and not to question the process by which those verdicts were reached." *Id.* at 117.

[9] In *McCullough*, the jury awarded the plaintiff "total damages" in the sum of $235,000. Following the jury's discharge, while thanking the jurors informally, the judge realized that the jury had intended the net recovery, after deductions for contributory negligence, to be $235,000. Over the objection of defense counsel, the judge reconvened the jury and asked the foreman: "[W]as it the intention of the jury to bring back an award of

III.

THE DISTRICT COURT VIOLATED THE SEVENTH AMENDMENT BY STRIKING DOWN A JURY'S PUNITIVE DAMAGE AWARD WHICH WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

As previously noted, the Seventh Amendment states that it is the province of the jury to decide all material facts and then render a decision based on those facts. Under the Seventh Amendment, the district court may not weigh the evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ["credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts **are jury functions, not those of a judge** . . . " (emphasis added)]; *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1301 (9th Cir. 1978); *California Computer Products, Inc. v. International Business Machines*, 613 F.2d 727, 733 (9th Cir. 1979).

$235,000 minus the 50% [contributory negligence]?" In open court and on the record, the foreperson responded that this was not the jury's intention. In explanation the foreperson stated:

> The intention was – total awards – the $235,000 would have been awarded to plaintiff. It should have read $470,000 minus the 50%. *Id.* at 1168.

To accomplish the jury's true intent, the district court entered judgment for plaintiff in the amount of $235,000. On appeal, the Sixth Circuit affirmed the procedure employed by the district court, noting that the trial judge had "inquired only as to the [jury's] intended verdict." *Id.* at 1172. In doing so, the judge had not elicited any testimony about the process by which the jury reached its verdict, but "merely asked for clarification of the final award." *Id.*

For this reason, the Court has instructed that a motion for judgment as a matter of law under FRCP 50(a) should be granted only in cases where the evidence "is so one-sided that [WESTIN] must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104-1105 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979) [the evidence "points so strongly in favor of [the moving party] that reasonable minds could not come to a different conclusion"]. In making this determination, the district court must afford great deference to the fact finding function of the jury, which includes the power to draw all reasonable inferences from the evidence in support of the verdict. *California Computer Products, Inc. v. International Business Machines Corp., supra*, 613 F.2d at 733. If the court finds that the evidence "provide[d] a sufficient probative basis upon which a jury could reasonably reach a verdict," the motion must be denied. *Panter v. Marshall Field & Company*, 646 F.2d 271, 281 (7th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981) [quoting *Brady v. Southern Ry.*, 320 U.S. 476, 480 (1943)].

At trial, Petitioner met its burden of proof in demonstrating fraud on the part of Westin to support Petitioner's claim for punitive damages under California law.[10] Specifically, Petitioner introduced evidence which

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[10] State law governs the factors which the jury and, in turn, the court is to consider in awarding punitive damages. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1979); *Brown v. Royalty*, 535 F. 2d 1024, 1027 (8th Cir. 1976).

proved, among other things, that Westin concealed material information and concocted admittedly false economic projections to induce Petitioner to continue with the development of the proposed hotel project and sign Westin's Pre-Opening and Management Agreements.

Based on this evidence, the jury found that Westin had acted fraudulently and awarded punitive damages in the sum of $2 million. Nevertheless, the district judge granted Westin's motion for judgment as a matter of law on the punitive damages issue – thereby supplanting his personal determination of the facts for those of the jury.

Petitioner submits that the district court's rejection of the jury's determination of this issue violates the Seventh Amendment.

IV.

THE COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO INSTRUCT THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS WITH REGARD TO THE HANDLING OF INDICATIONS FROM A JURY THAT ITS VERDICT DOES NOT ACCURATELY REFLECT ITS DECISION.

Supreme Court Rule 10.1(a) provides that the Court may, in its judicial discretion, grant review when a United States Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

"The Court's supervisory power over federal courts allows the Court to intervene to protect the integrity of the federal system." *Frazier v. Heebe*, 482 U.S. 641, 647, n. 7

(1987); *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (STEVENS, J., concurring) ["As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation."]; see also *United States v. Hale*, 422 U.S. 171, 181 (1975).

As stated by this Court, the task assigned to the jurors in our judicial system is to "tak[e] the law as given by the court, apply that law to the facts as they find them to be, and **express their conclusions in the verdict.**" See *Walker v. New Mexico S. P. R. Co.*, 165 U.S. 593, 596 (1897). In this case, the district court was faced with a common dilemma[11] – namely, what to do when the jury clearly indicates an intent to award damages in an amount different than indicated by the legal interpretation of its answers on the special verdict form?

Petitioner submits that the proper procedure in such cases is to seek clarification from the jury in the most unobtrusive manner possible. See *Dickerson v. Pritchard*, 706 F.2d 256, 259 (8th Cir. 1983) [where the jury indicates it was confused by the verdict form, "the Court . . . proceeded **intelligently** to attempt to correct that confusion" by resubmitting the case to the jury rather than accepting the original verdict].

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[11] As one might expect, the error made by the jury in this case appears to be quite common. See *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 963 (5th Cir. 1981) [jury improperly divides the total damages awarded among the several defendants]; *Grober v. Capital Transit Co.*, 119 F.Supp. 100, 107 (D.D.C. 1954) ["jury had agreed upon a total recovery for (plaintiff, but) . . . was confused about their right to apportion the verdict"].

The District Court's answer in this case was to ignore the jury's expression of its true intent and enter a judgment completely devoid of any basis in the evidence. The Ninth Circuit's approach was even more alarming: To declare the jury's intent of no importance to the adjudicative process and sidestep this important issue in a 3½ page memorandum opinion which misconstrues the record.

Petitioner urges this Court to grant the writ in this case to provide the federal judiciary with guidance on significant issues which will undoubtedly be raised time and again with the proliferation of special verdict forms and the use of written interrogatories to juries. The Court's direction on this issue will do much to bridge the growing gulf between the judiciary and the public it serves.

CONCLUSION

In reciting the grievances against King George in the Declaration of Independence, Thomas Jefferson included:

> For depriving us in many cases of the benefits of Trial by Jury.[12]

This injustice was remedied by the enactment of the Seventh Amendment to the United States Constitution, which "preserved" the right of trial by jury and mandated that "no fact tried by a jury shall be otherwise re-

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[12] Fisher, H. Richmond, *The Seventh Amendment and the Common Law: No Magic in Numbers*, 56 F.R.D. 507, 512 (1973).

examined in any Court of the United States, than according to the rules of the common law."

In this case, Petitioner was effectively denied its right to trial by jury and, as a result, was deprived of over $6 million in damages. More importantly, by its decision, the Ninth Circuit has signalled its intention to continue to deprive future litigants of this most sacred right guaranteed by the Constitution. Petitioner respectfully requests the Court grant this petition for writ of certiorari to review the Ninth Circuit's erroneous decision and forestall the resulting encroachment upon the Seventh Amendment.

DATED: November 10, 1994 Respectfully submitted,

PROCOPIO, CORY,
HARGREAVES
& SAVITCH

By: DAVID A. NIDDRIE

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

L.E.S. PROPERTIES HOTEL VENTURE, L.P., a California limited partnership,	*	No. 93-55095
Plaintiff-Appellant,	*	D.C. No. CV-89-01466-ACM
v.	*	
WESTIN HOTEL COMPANY, a Delaware corporation,	*	
Defendant-Appellee.	*	
L.E.S. PROPERTIES HOTEL VENTURE, L.P., a California limited partnership,	*	No. 93-55112
Plaintiff-Appellee,	*	D.C. No. CV-89-01466-ACM
v.	*	**MEMORANDUM***
WESTIN HOTEL COMPANY, a Delaware corporation,	*	
Defendant-Appellant.	*	(Filed May 31, 1994)

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

App. 2

Appeal from the United States District Court
for the Southern District of California
Alfredo C. Marquez, District Judge, Presiding

Argued and Submitted May 4, 1994
Pasadena, California

Before: **KOZINSKI** and **TROTT,** Circuit Judges, and **WILLIAMS,**** District Judge.

L.E.S. Properties ("L.E.S.") appeals, and Westin Hotel Co. ("Westin") cross-appeals, the district court's judgment following a jury trial on L.E.S.'s tort and contract claims arising out of a failed hotel venture. This is a diversity action in which California law applies.

I

L.E.S. first claims the district court was required to enter a judgment of $5,570,250 in compensatory damages to comply with the jury's intended verdict. L.E.S. does not appear to argue that the jury could aggregate the awards on its numerous claims; rather, it asserts that the jury intended to award $5,570,250 on *each.* However, this is clearly contrary to the special verdict form, wherein the jury awarded various amounts on the various theories of recovery. And, to the extent the jury did seek to aggregate the separate awards, as it seems to have indicated in its response to the judge's question, it was not entitled to do so. L.E.S. asserted multiple theories of recovery – with "[common] issues of fact and proof," RT of 10/27/92 at

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**The Honorable Spencer M. Williams, Senior United States District Judge for the Northern District of California, sitting by designation.

19 – so that the separate awards are duplicative of each other; L.E.S. could only recover on one. *Shell v. Schmidt*, 126 Cal. App. 2d 279, 291 (Cal. Ct. App. 1954). In essence, the special verdict form forced the jury to consider the legal bases for L.E.S.'s claims, when it seems to have wanted only to decide how much the case as a whole was worth.

The trial judge properly awarded L.E.S. $1,457,000 in compensatory damages for negligent misrepresentation, the highest award among the various causes of action.

II

L.E.S. also claims the district court erred in granting judgment pursuant to Fed. R. Civ. P. 50 in favor of Westin on its punitive damages claim.

A. L.E.S. first claims the district court erred in entering this judgment because Westin did not assert the insufficiency of proof of punitive damages in a motion for judgment as a matter of law at the close of plaintiff's case. But Rule 50 contains no such requirement: "Motions for judgment as a matter of law may be made at any time before submission of the case to the jury." Fed. R. Civ. P. 50 (a)(2). Westin made its motion – including a claim of insufficient evidence to support an award of punitive damages – at the close of all the evidence. This was perfectly proper.

B. We must therefore decide whether "the evidence and inferences, viewed in the light most favorable to the nonmoving party, can support only one conclusion: that

the moving party was legally entitled to a favorable judgment." *City of Phoenix v. COM/Systems, Inc.*, 706 F.2d 1033, 1036 (9th Cir. 1983). To recover punitive damages, L.E.S. had to show "by clear and convincing evidence that [Westin was] guilty of oppression, fraud, or malice," Cal. Civ. Code § 3294, that it "act[ed] with the intent to vex, injure or annoy, or with a conscious disregard of the plaintiff's rights." *Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 462 (1974). L.E.S. did not make such a showing.

We agree with the district court that the evidence L.E.S. presented did not sufficiently support an award of punitive damages. Westin was entitled to judgment as a matter of law on this issue.

III

Westin claims the district court erred in instructing the jury to consider a breach of the implied covenant of good faith and fair dealing in the Pre-opening Services Agreement because there was insufficient evidence that it breached that agreement. Westin, however, did not move for judgment as a matter of law on that issue, as required by Fed. R. Civ. P. 50(b). There is no authority in this circuit to support Westin's argument that its objection to Jury Instruction No. 19 was sufficient to comply with Rule 50(b)'s requirements; it is thus precluded from challenging the sufficiency of the evidence on appeal. *Benigni v. City of Hemet*, 879 F.2d 473, 476 (9th Cir. 1988); *Farley Transp. Co. v. Santa Fe Transp. Co.*, 786 F.2d 1342, 1347 (9th Cir. 1985).

IV

Westin also claims the district court erred in awarding L.E.S. its attorney's fees and litigation expenses. We apply state law in reviewing its claim, *Diamond v. John Martin Co.*, 753 F.2d 1465, 1467 (9th Cir. 1985), and we find no error. Both parties had agreed that the prevailing party would be entitled to reasonable attorney fees "[i]n any legal proceeding of any nature . . . involving the . . . enforcement of any of the terms of [the Pre-Opening Services Agreement]." Those terms included, among others, an implied covenant of good faith and fair dealing, *Seaman's Direct Buying Servs., Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 768 (1984), that the jury found had been breached. L.E.S. was thus entitled to recover reasonable attorney's fees and litigation expenses. Cal. Civil Code § 1717; *see Bussey v. Affleck*, 225 Cal. App. 3d 1162, 1166 (Cal. Ct. App. 1990).

AFFIRMED.

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

L.E.S. PROPERTIES HOTEL VENTURE, L.P., a California limited partnership,	No. 93-55095
Plaintiff-Appellant,	D.C. No. CV-89-01466-ACM
v.	
WESTIN HOTEL COMPANY, a Delaware corporation,	
Defendant-Appellee.	
L.E.S. PROPERTIES HOTEL VENTURE, L.P., a California limited partnership,	No. 93-55112
Plaintiff-Appellee,	D.C. No. CV-89-01466-ACM
v.	
WESTIN HOTEL COMPANY, a Delaware corporation,	**ORDER**
Defendant-Appellant.	(Filed Aug. 16, 1994)

Before: **KOZINSKI** and **TROTT**, Circuit Judges, and **WILLIAMS**,* District Judge.

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*The Honorable Spencer M. Williams, Senior United States District Judge for the Northern District of California, sitting by designation.

The petition for rehearing is denied. The full court has been advised of the suggestion for en banc rehearing and no judge has requested a vote thereon. The suggestion for rehearing en banc is therefore rejected. Fed. R. App. P. 35(b).